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No. 88-504

In The

# Supreme Court of the United States

October Term, 1988

THE STATE OF OKLAHOMA *ex rel.*
COMMISSIONERS OF THE LAND OFFICE

*Petitioner,*

vs.

CLAUDE R. BUTLER

*Respondent.*

## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

JOHN S. ATHENS
JAMES R. RYAN
RUSSELL H. HARBAUGH, JR.
DOUGLAS L. INHOFE
CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

*Attorneys for Respondent*

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OR CALL COLLECT (402) 342-2831

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## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

### I. THE CASE INVOLVES NO SUBSTANTIAL FEDERAL QUESTION

This case presents a single question: What is the meaning of a reservation of "oil, gas and other mineral rights" in deeds to predecessors of respondent[1] from the State of Oklahoma? The question is thus one involving the Oklahoma Constitution and Statutes, Oklahoma conveyances, land in Oklahoma and Oklahoma's law pertaining to real estate matters; a case whose final answer

[1] Respondent, Claude R. Butler, is an individual. Rule 28.1 does not apply.

should come from the Oklahoma Supreme Court. *Miller v. Anderson*, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893). And, in fact, that court has given its answer. *See State ex rel Comm'rs of Land Office v. Butler*, 753 P.2d 1334 (Okla. 1987), which is reproduced in full at Appendix A-1 of the petition for certiorari filed herein. There is no substantial federal question presented by the petition for a writ of certiorari and the petition should be dismissed.

The jurisdiction of the Court to hear this case on a writ of certiorari to the Supreme Court of the State of Oklahoma is derived from 28 U.S.C. § 1257(a) (1988) and exists "where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Petitioner's only contention that this case presents a federal question for review under the above statute is a claim that the courts of the State of Oklahoma have so misinterpreted the "oil, gas and other mineral rights" reservation in deeds from the State as to sanction a breach of a trust created by the Enabling Act, Act of Congress June 16, 1906, 34 Stat. 267. The Act conveyed certain U.S. lands to the State of Oklahoma to be held in trust for common schools, universities and other educational and public institutions. The pertinent provisions of the Enabling Act are set forth as Appendix D to the petition for certiorari filed by the petitioner.

The Act contemplated, in broadest terms, the eventual sale of portions of the lands originally granted to the State by the Act. Moreover, the lands involved in this case were not lands conveyed to the State by the United

States pursuant to the Act. Instead, funds available to the Land Commissioners of the State have been invested from time to time in first mortgage loans upon agricultural lands. Upon default, the instant and other lands were acquired by the Land Commissioners in connection with mortgage foreclosures. Subsequently, pursuant to local statutory authority, the instant lands were sold by the Land Commissioners to respondent's predecessors by conveyances which reserved unto petitioner an undivided fifty percent of all oil, gas and other mineral rights.

In this action, respondent, as successor owner, commenced suit to quiet title as to the coal underlying the subject lands because petitioner had asserted ownership of a one-half interest in such coal by virtue of the subject reservation. At all levels of inquiry, petitioner principally argued that the subject reservation was ambiguous so as to permit the introduction of extrinsic evidence. However, the trial court and both state appellate courts decided in respondent's favor, determining that as a matter of law the subject reservation was not ambiguous, that consequently extrinsic evidence was not admissible and, further, that under Oklahoma law, the reservation included "only oil and gas and those minerals produced as constituents and components thereof." *State ex rel. Comm'rs of Land Office v. Butler*, 753 P.2d at 1337.

Again in the instant petition, petitioner posits the same questions for review by this Court that it has repeatedly raised and had rejected by the courts below. Now, however, petitioner casts these issues of local law as coming within the ambit of the Enabling Act, thereby

seeking to create a federal question worthy of consideration by this Court. Respondent respectfully submits that the subject reservation was created by state statutes, rather than by federal law, and that construction thereof by local courts should not be disturbed by this Court.

## II. PROCEDURES FOR SALE OF LANDS ARE NOT SPECIFIED IN ENABLING ACT

The Enabling Act clearly permitted the State to sell lands covered by the grant, imposing procedural restrictions only as to particular lands earmarked for particular purposes. Even these restrictions were limited and largely involved only requirements of appraisal and public sale. In general, the Enabling Act left it to the State to establish the procedures for the sale of lands granted by the Act. Section 8 of the Act, for example, provides that certain of these original lands "shall be apportioned and disposed of as the Legislature of said State may prescribe." Section 8 specifically provides that where lands granted by the Enabling Act "are valuable for minerals, gas and oil, such lands shall not be sold by the said State prior to January first, nineteen hundred and fifteen. . . ." Conversely, the Act clearly allows for sales of such valuable mineral lands after January 1, 1915, and says nothing about the State reserving any interest in minerals underlying such lands.

Section 9 of the Act directs how sales of those lands "herein granted for the support of the common schools" shall proceed and provides only that such lands, "if sold, may be appraised and sold at public sale, in one hundred and sixty acre tracts, or less, under such rules and regulations as the Legislature of the said State may prescribe. . . ."

As previously stated, the lands involved in this case are not even the lands specifically referred to in the Enabling Act, which is the only source of a federally protected right which can be asserted in this case. These lands were subsequently acquired by the State through mortgage foreclosures. However, the basic restrictions of appraisal and public sale contained in the Enabling Act, though directed specifically to sale of the lands granted by the Act, have still been consistently followed by the Land Commissioners in all sales involved herein. Importantly, the Act contains no provisions which specify in any particular manner the method by which lands were to be sold by the Land Commissioners. All such matters were to be determined by the State legislature.

Section 10 is another example in which the Enabling Act imposes requirements that particular lands (not those involved in this case) be sold only "at public sale" but does not otherwise provide limitations on the methods of sale of such lands or of any others.

The basic policy of the Act is expressed in Section 8 relating to "Section thirty-three" lands (reserved for charitable and penal institutions and public buildings) which states that such lands "shall be apportioned and disposed of as the Legislature of said State may prescribe." The State was obviously expected to sell lands from time to time, even lands in the original grant, as well as any other lands which might be acquired as trust property.

The only requirements of the Enabling Act pertaining to land sales involve appraisal and public sale. The lands in this case were sold to respondent's predecessors at public sale pursuant to state statutes following an

appraisal process established by the Land Commissioners and there is no suggestion that the sales procedure involved any impropriety. Both requirements of the Act were met as to the instant lands, even though such requirements were not specifically applicable to such lands. Significantly, there was no requirement in the Enabling Act that the State reserve any minerals in connection with any sale.

Finally, it is an accepted tenet of the law of trusts that when a trustee is authorized to sell trust property and no specific restrictions on the manner of sale have been imposed, the trustee may exercise discretion in the sale to assure the best price. *See* G. Bogert, *Trusts and Trustees*, § 745 (rev. 2d ed. 1982). Courts of equity will not generally substitute their judgment for that of a trustee in such cases unless there is evidence of self-dealing, procedural defects, improprieties, bad faith or a sale price disproportionate to the real value of the property. In this case the appraisal and public bidding procedures presumably operated to bring a fair price and there is no suggestion of self-dealing or other impropriety.

The emphasis in the petition upon the term "sacred" trust seems to suggest that some new rule of the law of trusts not applicable to other trusts may apply to sacred trusts as if involving rituals, incense and arcane incantations. The word "sacred" does not appear in the Oklahoma Enabling Act and emerges only in the Oklahoma Constitution. This is perhaps symptomatic of the often flamboyant character of the chief architect of the document, Oklahoma's first Governor, "Alfalfa Bill" Murray. Again, no substantial federal question is raised and an

interpretation of the Oklahoma Constitution properly rests with the Oklahoma Supreme Court.

## III. DEED RESERVATION PURSUANT TO STATE STATUTE DOES NOT RAISE A FEDERAL QUESTION

The instant sales were made and the patents were delivered reserving unto the State, pursuant to State statute, an undivided one-half of the "oil, gas and other mineral rights." Taken alone, the term "minerals" or "mineral rights" is very broad and encompasses rock, sand, mica, the soil itself and minerals as exotic as beryllium, titanium and argon. As the Supreme Court of Oklahoma correctly observed: " 'Oil, gas and other minerals' is not a description of the entire mineral estate." *State ex rel. Comm'rs of Land Office v. Butler*, 753 P.2d 1334, 1337.

Of greater importance, the term "oil, gas and other mineral rights" and similar phrases have been repeatedly adjudged in Oklahoma to be limited to those minerals so related to oil and gas as to be essentially components of oil and gas. *Barker v. Campbell-Ratliff Land Co.*, 64 Okla. 249, 167 P. 468 (1917), *Wolf v. Blackwell Oil & Gas Co.*, 77 Okla. 81, 186 P. 484 (1920); *State v. Hendrix*, 196 Okla. 596, 167 P.2d 43 (1946); and *Panhandle Cooperative Royalty Co. v. Cunningham*, 495 P.2d 108 (Okla. 1971). The angst and anguish expressed in the opinions of the Supreme Court of Oklahoma were concerned with the interpretation of these words in the light of its own precedents. The focus of the concerns of the Supreme Court of Oklahoma was upon whether or not words of grant or of reservation in Oklahoma land conveyances referring to "oil, gas and other minerals" or to "oil, gas and other mineral rights"

were, as a matter of Oklahoma jurisprudence, limited by the established common law concept of *ejusdem generis* to petroleum related minerals, whether that rule is one of interpretation or construction and whether or not parol evidence should have been admitted in this particular case. This is Corpus Juris and Hornbook stuff and hardly so substantial as to compel the studied attention of the United States Supreme Court.

Where, then, is the substantial federal question traditionally and wisely required to engage the Court's attention to this case? Petitioner urges that its germ is found in *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 548, 17 L. Ed. 2d 515 (1967), in which the State of Arizona had taken, for no compensation whatsoever, highway easements and material sites on lands donated by the United States to the State of Arizona under the New Mexico-Arizona Enabling Act, which is similar but by no means identical to the Oklahoma Enabling Act. In that case, the Arizona courts had applied rigidly a presumption that the creation of a highway always enhances the value of the remaining land by an amount at least, or more than, the value of the lands taken.

However, *Lassen* does not apply to these facts. *See State ex rel. Comm'rs of Land Office v. Butler*, 753 P.2d at 1339. In this case, the lands were appraised prior to sale, advertised for public bidding and sold in accordance with the applicable statutes. It is not suggested by petitioner that any improprieties were involved in these sales; nor were these sales in which the purchaser was the State itself or one of its agencies.

*Miller v. Anderson*, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893), has long stood for the proposition that interpretation of a state statute is purely a local question and involves nothing of a federal character. *Miller* came to the Court on writ of error from the supreme court of Alabama and involved public lands that had been made available by Congress to the State of Alabama for construction of railroads. Certain of these lands were granted, pursuant to state statute, to a railway company and such lands were, in turn, mortgaged back to the state to secure a loan. The rail company subsequently defaulted on the loan; the lands were reacquired by the state and sold pursuant to state statute. A competing title claimant claimed to have derived superior title directly from the rail company, alleging that the Alabama statute and the mortgage both allowed the rail company to sell the lands "in accordance with the acts of congress granting the same." The state supreme court concluded that the power of sale was conditioned upon satisfactory release of the preexisting mortgage which, of course, had not occurred and, further, that a sale by the rail company could only be effected after certification from the state to the secretary of interior as prescribed by the act of Congress. Because no such certificate had issued, the state court determined that, under the applicable state statute and the terms of the mortgage, the purported sale by the rail company was void.

In dismissing the appeal, the U.S. Supreme Court stated:

> *Now, whether that was a correct construction or not of the [state] act of 1870, and the reservation of the mortgage, is purely a local question, and involves nothing of a federal character.* The question is not what rights passed to the state under the acts of congress, but what authority the railroad company had under the statute of the state. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of congress as prescribing the rule and measure of the rights granted by the state does not make the determination of such rights a federal question. . . .The inquiry along federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a federal origin.

*Miller v. Anderson*, 150 U.S. at 136, 14 S.Ct. at 54, 37 L.Ed. at 1029 (emphasis added).

In the instant case, Oklahoma statutes, not a federal statute, established the procedure for sale of the subject lands recovered by the State as the result of mortgage foreclosures. The Oklahoma Supreme Court has decided that all sale proceedings herein were in conformity with such statutes and that the words of the subject reservation in the conveyances by the State into respondent's chain of title followed the statutory language verbatim.

With respect to such reservation, the Oklahoma Supreme Court concluded:

"We therefore reaffirm our consistent position that 'oil, gas and other minerals' and similar phrases are not ambiguous. They do not include coal or other unspecified minerals."

*State ex rel. Comm'rs of Land Office v. Butler*, 753 P.2d at 1339.

## CONCLUSION

The petition for writ of certiorari fails to present any substantial federal question and should be dismissed.

Respectfully submitted,

JOHN S. ATHENS
JAMES R. RYAN
RUSSELL H. HARBAUGH, JR.
DOUGLAS L. INHOFE

*Attorneys for Respondent*